SERVED: December 8, 1994

NTSB Order No. EA-4276

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 10th day of November, 1994

JOHN V. CONAHAN, III, Applicant, v. DAVID R. HINSON, Administrator, Federal Aviation Administration, Respondent.	Docket 193-EAJA-SE-13324

OPINION AND ORDER

Applicant has appealed from the initial decision of Administrative Law Judge William A. Pope, II, served June 24, 1994, denying applicant's application for attorney fees and expenses pursuant to the Equal Access to Justice Act (EAJA), 5 U.S.C. 504.[1] As further discussed below, applicant's appeal is

[1] A copy of the initial decision is attached.

denied and the denial of fees and expenses is affirmed.[2]

Background

This EAJA claim arose from an enforcement action in which the Administrator sought to revoke applicant's airline transport pilot (ATP) certificate on an emergency basis as a result of his alleged intentional falsification of six entries in his pilot logbook, and his piloting of 17 flights allegedly subject to 14 C.F.R. Part 135 when he was not qualified to do so.[3] At the conclusion of a three-day evidentiary hearing, the law judge dismissed the complaint, finding that none of the charges could be sustained.

With regard to the six allegedly falsified logbook entries indicating that respondent had received dual flight instruction, the law judge found that although respondent had actual knowledge of the entries, which were made by his fiancé, the entries were not false. Accordingly, he dismissed the alleged violation of 14 C.F.R. 61.59(a)(2), and the associated violations of 14 C.F.R. 61.51(a) and (c)(5). Regarding the 12 allegedly improper Part 135 flights applicant piloted for a corporate client of his employer's in a PA-32-301 Saratoga, the law judge credited applicant's testimony that his employer told him the aircraft was owned by the corporate client, and that he therefore reasonably

[2] Applicant's motion for expedited review, and his request for oral argument are both denied as unwarranted in this case.

[3] The Administrator alleged violations of 14 C.F.R. §§ 61.59(a)(2), 61.51(a), 61.51(c)(5), 135.293(a), and 135.293(b).

believed the flights were governed by Part 91 and not by Part 135. With regard to the five allegedly improper Part 135 flights applicant made in his PA-31-350 Navajo, the law judge credited applicant's explanation of his logbook entries (for example, describing one of the flights as a "charter" flight), and his claim that all of the flights were conducted for either his own personal business or the personal business of one of the co-owners of that aircraft. Accordingly, the law judge concluded that those flights were governed only by Part 91, and not by Part 135. Thus, he dismissed the alleged violation of 14 C.F.R. 135.293.[4]

On appeal, the Board affirmed the dismissal of the complaint, but on slightly different grounds with regard to the falsification charge. Specifically, we found that the entries were false but that -- on the record before us including the law judge's acceptance of applicant's fiancé's explanation of the reason why she made those entries -- applicant's denial of actual knowledge could not be rejected. Administrator v. Conahan, NTSB Order No. EA-4044 (1993). This EAJA claim followed.[5]

[4] In addition to the falsification and Part 135 charges discussed above, the complaint also alleged that applicant piloted a PA-28 aircraft on a flight under IFR (instrument flight rules) when he had not had the requisite flight time as a pilot, in violation of 14 C.F.R. 135.243(c)(2). The law judge disallowed the Administrator's attempted last-minute amendment to the complaint, which would have changed the date of the alleged flight, and subsequently dismissed the charge for lack of proof. The Administrator was apparently prepared to prove the charge if the amendment had been allowed.

[5] Applicant's EAJA request, as supplemented, is for $31,299.24 in fees and expenses.

Applicant's EAJA claim

The EAJA requires the government to pay to a prevailing party certain attorney fees and costs unless the government establishes that its position was substantially justified, or that special circumstances would make an award of fees unjust. 5 U.S.C. 504(a)(1). For the Administrator's position to be found substantially justified it must be reasonable in both fact and law, i.e., the facts alleged must have a reasonable basis in truth, the legal theory propounded must be reasonable, and the facts alleged must reasonably support the legal theory. U.S. Jet v. Administrator, NTSB Order No. EA-3817 at 2 (1993); Pierce v. Underwood, 487 U.S. 552, 565, 108 S.Ct. 2541 (1988). This standard is less stringent than that applied at the merits phase of the proceeding, where the Administrator must prove his case by a preponderance of the reliable, probative, and substantial evidence. Accordingly, the FAA's failure to prevail on the merits does not preclude a finding that its position was nonetheless substantially justified under the EAJA. See U.S. Jet v. Administrator at 3; Federal Election Commission v. Rose, 806 F.2d 1081, 1087 (D.C. Cir. 1986).

The law judge rejected applicant's EAJA claim, holding that the Administrator's position throughout the proceeding was substantially justified, and noting that the case ultimately turned on credibility determinations which could not have been predicted in advance. Specifically, the law judge held that the logbook entries falsely indicating that applicant had received

flight instruction,[6] which were certified by applicant as being true, constituted sufficient circumstantial evidence from which it could be inferred that applicant had knowledge of those entries, and cited Board case law.[7] He concluded that, even though the Administrator knew that applicant was denying he had actual knowledge of the entries, "the credibility determination in this case could have gone either way," and accordingly, "it was reasonable for the Administrator to proceed with the intentional falsification allegations." (Initial decision at 4.)

Regarding the Part 135 charges, the law judge found that, while the Administrator could have sought additional evidence during his investigation, the evidence presented by the Administrator at the hearing would have been sufficient, if unrebutted, to sustain the violations. Specifically, the

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[6] Applicant conceded at the hearing that he did not feel at the time of the six flights in question that flight instruction had occurred during those flights. His fiancé explained, in testimony credited by the law judge, that she entered the time in applicant's logbook under the column titled "dual received" simply because she saw from flight records that two pilots had been on board, and that she did not realize the column was intended to record dual *instruction* received. Applicant attempted to argue at the hearing that, based upon a recently-formulated legal theory, the other pilots aboard the subject flights were actually authorized as ATP-certificate holders to provide flight instruction, and thus the entries were not false after all. Although the law judge accepted that argument and found the entries were not false, this theory was ultimately rejected by the Board. Thus, there is no real dispute that the entries were false.

[7] The law judge cited Administrator v. Hartwig, 6 NTSB 788 (1989), Administrator v. Juliao, NTSB Order No. EA-3087 (1990), and Administrator v. Krings, NTSB Order No. EA-3908 (1993), where we indicated that an intent to falsify can be inferred from the documents containing the false entries.

evidence showed that the flights in the Saratoga were for a corporate client of applicant's employer, and that the aircraft was not owned by the corporate client;[8] and that applicant described two of the flights in the Saratoga and one of the flights in the Navajo as "charter."[9] The law judge found that the Administrator could reasonably infer from the use of that term that the flights in question were Part 135 flights. Moreover, both aircraft in question were listed on operations specifications incorporated in applicant's employer's Part 135 operating certificate. Despite this evidence, however, the Part 135 charges were dismissed because the law judge and the Board credited applicant's exculpating explanation of his logbook notations, and also credited his testimony that he relied on his

[8] Ownership of the aircraft is significant because, if the corporate client had owned the aircraft -- as was the case in other flights made by applicant's employer for that client in the Navajo -- the corporate client would likely be deemed the "operator" of the flight and it would be subject only to Part 91. On the other hand, the obtaining of both an aircraft and a flight crew from a single source (in this case, applicant's employer), known as a "wet lease", is usually conclusive evidence that the flight is an operation for compensation or hire, and subject to Part 135. Administrator v. Poirer, 5 NTSB 1928 (1987).

[9] We recognize that, as to four of the flights in the Navajo, applicant did not use the term "charter," and thus the evidence was arguably somewhat weaker. However, in light of our conclusion that the Administrator's position was substantially justified as to all of the falsification charges and the bulk of the 135 charges brought, we need not decide whether the evidence as to these four flights, standing alone, was sufficient to justify those allegations. Caruso v. Administrator, NTSB Order No. EA-4165 (1994) (even assuming some charges lacked a reasonable basis in law, it did not detract from the overall reasonableness of the Administrator's pursuit of the case where most charges in the complaint were found reasonable).

employer's assurance that the flights in the Saratoga were Part 91 flights.

Applicant challenges the law judge's finding that the Administrator's position in this case was substantially justified, arguing that, notwithstanding the role that credibility judgments played in the outcome of this case, the Administrator had insufficient evidence to begin with. Applicant also asserts that his financial burden was increased by the Administrator's inept handling of the case, including allegedly unreasonable discovery requests and unnecessary prolonging of the evidentiary hearing. Finally, applicant claims that the law judge violated his procedural due process rights by taking longer than 60 days (as specified in 49 C.F.R. 826.37) to issue his EAJA decision.

We agree entirely with the law judge's reasoning in this case. As the law judge emphasized, applicant prevailed on both sets of charges only because the law judge and the Board ultimately made credibility findings in his favor. The Administrator was not obligated to accept applicant's denial of knowledge of the false entries,[10] or his explanation of his

[10] On appeal, applicant emphasizes that the investigating FAA inspector accepted as true, from the start of his investigation, that applicant's fiancé had made the entries. In arguing that the Administrator therefore had no possible theory of liability, applicant ignores the fact that applicant was charged with making, or *causing*, the false entries to be made. The Administrator's theory of liability was not defeated by the fact that applicant did not physically make the entries. Indeed, the Administrator would have prevailed if it had been found that applicant had actual knowledge of the entries made by his fiancé.

logbook notations and his understanding of the Part 135 flights in the Saratoga. Rather, the Administrator was substantially justified in pursuing the case so that appropriate credibility judgments could be made. We have held that when key factual issues hinge on witness credibility, as they did in this case, the Administrator is substantially justified -- absent some additional dispositive evidence -- in proceeding to a hearing where credibility judgments can be made on those issues.[11]

In light of our affirmance of the law judge's denial of fees, applicant's remaining arguments (that he was harmed financially by the law judge's delay in issuing his initial decision, and by the Administrator's handling of the case) are rendered moot.

ACCORDINGLY, IT IS ORDERED THAT:

The initial decision denying applicant's request for attorney fees and expenses is affirmed.

HALL, Chairman, LAUBER, HAMMERSCHMIDT and VOGT, Members of the Board, concurred in the above opinion and order.

[11] See Caruso v. Administrator, NTSB Order No. EA-4165 at 9 (1994).